No. 18-587

IN THE
# Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

*Petitioners,*

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF PROFESSORS— DEAN RONALD A. CASS, CHRISTOPHER C. DEMUTH, SR., AND JAMES L. HUFFMAN—AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are teachers, scholars, and former government officials who each have had extensive engagement with administrative law over a period of more than 40 years. *Amici* have served in a variety of positions in

[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

the United States government, including positions in the Executive Office of the President, executive departments, independent agencies, and the judicial branch. *Amici* have been responsible for making decisions in official capacities and for reviewing agency decisions. They also have been deeply involved with organizations devoted to administrative law and have taught classes and written numerous articles and books on matters implicated in the questions presented in this case. This brief reflects *amici*'s long-standing interests in the subject of administrative law and particularly in standards for judicial review of administrative action.

## SUMMARY OF ARGUMENT

The questions presented in this case address (1) whether the particular decision at issue is "committed to agency discretion by law," and (2) and whether the particular decision was lawful.

The critical inquiry in the second question is the manner in which courts decide whether an administrative action is "arbitrary" or "capricious" or "an abuse of discretion." See Administrative Procedure Act (APA), 5 U.S.C. §706(2)(A). That inquiry also implicates two subsidiary questions: the extent to which an administrative action that changes a prior agency action bears a higher burden of justification than an action taken on a matter of first impression for the agency, and the degree to which courts are permitted to inquire into the particular considerations in the mind of an administrator in assessing the lawfulness of an agency action.

*Amici* address only the considerations respecting the second question presented, elaborating considerations relevant to the manner in which courts decide whether an administrative action is "arbitrary, capricious, [or]

an abuse of discretion." APA, 5 U.S.C. §706(2)(A). In doing so, however, we also address the dividing line between the determination necessary to resolving question (1) (whether a matter is committed to agency discretion by law) and the central part of question (2) (whether a decision is arbitrary, capricious, or an abuse of discretion). Although our analysis generally accords with arguments favorable to petitioners, our goal is not to support one party but to clarify analysis of issues respecting the nature of review that are before the Court in the instant case.

*Distinguishing Reviewable from Unreviewable Discretion.* The APA distinguishes two sorts of analysis. One is *whether* a matter is "committed to agency discretion by law" in such a manner as to preclude review. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831–35 (1985) (*Chaney*). The other is *how* courts review matters on which agencies enjoy discretion that remains subject to judicial review. See, e.g., *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 511–14 (2009) (*Fox Television Stations*); *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981, 989 (2005) (*Brand X*). The APA both excludes agency actions from judicial review "to the extent that . . . agency action is committed to agency discretion by law," APA, 5 U.S.C. §701(a)(2), and provides for review, among other things, for "an abuse of discretion." APA, 5 U.S.C. §706(2)(A). While the APA does not insulate *all* discretionary action from review—a reading that would make providing review for "abuse of discretion" incongruous—the text of the APA plainly commands respect from courts for the exercise of delegated discretion by agencies.

*Scope of Review for Ordinary Discretion*. When statutes provide limiting directives, exercises of discretion can be reviewed to assure that the administrator has not acted contrary to those directives. See APA, 5 U.S.C. §706(2)(A), §706(2)(C), §706(2)(D); *Chaney*, 470 U.S. at 831–35. Apart from specific constraints on the scope of delegated discretion, the exercise of discretion is checked only to assure consistency with basic principles for reasoned decision-making. See, e.g., *Fox Television Stations*, 556 U.S. at 513–14; *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974) (*Bowman Transp*.). As this Court has emphasized, the scope of review is "narrow," an observation frequently coupled with the caution that "a court is not to substitute its judgment [on questions of policy] for that of the agency." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (*State Farm*). Similarly, the Court stated that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Id*., at 42. That narrow review standard is consistent with an appreciation that even reviewable discretionary action is still *discretionary* action—and the fact that a range of discretionary actions is made expressly unreviewable indicates the law's antipathy to intrusive judicial review of administrative discretion.

Concern over judicial intrusion into discretionary policy-based judgments is most evident in the narrowness of the terms used to authorize reviewing courts to set the agency action aside. See APA, 5 U.S.C. §706(2)(A). The terms respecting review of discretionary decisions contrast sharply with those respecting review of interpretations of law. See APA, 5 U.S.C.

§706, §706(2)(B), §706(2)(C). Despite confusion on this score, deference to administrative *exercises* of discretion for policy matters—as opposed to *interpretation* of the *scope* of discretion committed to executive officers—is the cornerstone of decisions, such as the *Chevron* decision, interpreting those commands, and informs demands to clarify the meaning of *Chevron* (or to abandon the test associated with it). See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–46, 859, 862–66 (1984) (*Chevron*); *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2142–44 (2016) (*Cuozzo*); *id*. at 2148 (Thomas, J. concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1152–58 (10th Cir. 2016) (Gorsuch, J., concurring).

*Scope of review for policy changes*. The APA and the precedents of this Court do not support different degrees of scrutiny—in particular, they do not support heightened scrutiny—for use of discretionary authority to make changes in agency policies. See, e.g., *State Farm*, 463 U.S. at 41. The text of the APA plainly does not require different review standards for agency exercises of discretion that alter the policies guiding prior exercises of agency discretion. As this Court has said: "[t]he statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations*, 556 U.S. at 515; see also *State Farm*, 463 U.S. at 41. Nor would it be reasonable to infer from the APA a general intention to make successive exercises of policy discretion increasingly difficult. Those who wrote and voted for the APA were acutely aware of the complicated nature of administrative decision-making, including the forces that promote—and also those that oppose—changes in policy over time. See, e.g., George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act*

*Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1560–61, 1583–1623, 1655–68 (1996).

As former government officials, *amici* attest that there are many impediments to making policy changes, from the procedural rigors of some policymaking modes to the resistance of individuals and groups advantaged by or invested in the existing policy. See also Merrick Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 507, 508 (1985); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1385–88, 1396–98 (1992). It is important to note as well that groups that may resist policy changes frequently include agency staff, a set of government officials who tend to turn over less often than politically-appointed officials with policy-making authority. Their relative longevity in office and frequent association with the adoption of earlier policy initiatives can reduce their enthusiasm about making changes supported by politically-appointed officials who have different views and shorter time horizons on getting policies implemented. See, e.g., Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 185–87, 216–19 (1978); James Q. Wilson, *The Dead Hand of Regulation*, 25 Pub. Int. (Fall 1971) at 39, 48.

Given these considerations, courts reviewing agency actions should be particularly careful not to give undue weight to disputes between staff resisting change and policy-making officials supporting change. See, e.g., *Department of Commerce v. New York*, 588 U.S. ___, ___–___ (2019) (slip op. at 17–20) (*Department of Commerce*). The existence of multiple sources of resistance to changing policies that are already built into the decision-making process also supports the conclusion reached by this Court in *State Farm* that rescission of

a rule is subject to the same review standard as adoption of the rule, not a higher or lower standard, *State Farm*, 463 U.S. at 41.

This Court has, however, identified settings in which changes in policy require explanation to satisfy the modest tests set out in APA §706(2)(A). For example, *Fox Television Stations* observed that changes in policy based on fact-findings at odds with earlier findings may call for explanation or at least recognition of that circumstance. *Id*., 556 U.S. at 514. This instruction should not be read as a directive to ignore the limitations on judicial review written into law and emphasized repeatedly by this Court. See *Department of Commerce*, 588 U. S. (slip op., at 18–20); *FERC v. Electric Power Supply Assn.*, 577 U. S. ___, ___ (2016) (slip op., at 30); *Fox Television Stations*, 556 U.S. at 515–16. *Amici* believe it is critical for this Court to clarify the limitations on review in this context to avoid misunderstanding by lower courts.

*Looking into administrators' motives.* This Court has made clear that, in general, for a court reviewing agency action, it is "not the function of the court to probe the mental processes" of the administrator. *Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan II*). The Court has warned that delving into the motives and thought processes of a decision-maker in a co-equal branch of government—like looking into the motives of a judge rather than what is written in the judge's opinion—would be "destructive" of the responsibility of administrators and would undermine "the integrity of the administrative process." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan IV*). Similar cautions have been expressed by other judges over many years. See, e.g., *Gregoire v. Biddle*, 177 F.2d 579,

580–81 (2d Cir. 1949) (op. for the court by Learned Hand, C.J.) (*Gregoire*).

Despite concerns over the adverse effects of endeavoring to divine the motives behind official acts, this Court has identified a small number of instances in which these inquiries will be permitted. It recently described these exceptional cases as those in which a challenged policy cannot plausibly rest on any sustainable ground, so that "it is impossible to 'discern a relationship to legitimate state interests,' or that the policy is inexplicable by anything but [legally impermissible] animus.'" *Trump v. Hawaii*, 585 U. S. ___ (2018) (*Trump v. Hawaii*) (slip op. at 33) (quoting *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996) (*Romer*)). Those are cases involving actions that this Court said "lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'" *Trump v. Hawaii*, 585 U.S. (slip op. at 33) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (*Moreno*)). In essence, the conclusion followed from finding no rational basis for the challenged actions. Last term, in *Department of Commerce*, this Court offered other, strongly-worded cautions against judicial inquiries into reasons for official action beyond those offered in support of a course of action, including considerations tied to changes in political priorities. 588 U. S. (slip op. at 24).

Nevertheless, the *Department of Commerce* majority found that, as part of a "premature" inquiry into the basis for the Secretary of Commerce's decision, evidence was produced demonstrating that the Secretary's proffered explanation was "pretextual," further concluding that this finding excused the premature demand for such evidence. See *id*., (slip op. at 24–28). In contrast to decisions such as *Romer* and *Moreno*, *Department of Commerce* supported setting aside a decision as

improperly motivated *after* determining that it was *justified* on the grounds stated by the administrator, see *id.*, (slip op., at 19–20), making reference to the administrator's motive a separate inquiry rather than an extrapolation from the absence of a rational basis for his action. The peculiar ground for decision in *Department of Commerce* creates tension with the Court's decision in *SEC v. Chenery*, 318 U.S. 80, 87 (1943) (*Chenery*), which limited review to the stated rationale for administrative action.

*Problems of inquiry into official motives*. More important, this approach threatens to greatly expand the occasions for inquiry into the motives of administrators, a change that would invite challenges that almost certainly would enmesh courts in the very sort of inquiries that this Court warned against in *Morgan II* and *Morgan IV* and that Judge Hand criticized in *Gregoire*—inquiries that are at odds with the understood division of responsibilities between courts and coordinate branches of government. See, e.g., *Department of Commerce*, 588 U.S. (slip op., at 2, 7–8, 13–15) (Thomas, J., dissenting).

*Amici* strongly support the Court's traditional reluctance to examine the motives of administrative decision-makers exercising legally granted authority. Having been government decision-makers as well as academic critics of government decisions, *amici* underscore the threat to constitutionally separated powers if reviewing judges seek to plumb the motives of officials in co-equal branches of government. The general points on this threat were eloquently stated by Justice Frankfurter in *Morgan IV* and Judge Hand in *Gregoire*, observing the risk inquiries into motive present to ordinary official conduct. See *Morgan IV*, 313 U.S. at 422; *Gregoire*, 177 F.2d at 580–81.

In addition, changing the traditional, APA-based standard of review to accommodate inquiries into official motives encourages use of judicial review not strictly as a means for keeping official actions within *legal* bounds, but as means for extending *political* disputes into the judicial domain. This undermines the perceived legitimacy of the courts and intrudes on decisions committed to other branches. See, e.g., *Trump v. Hawaii*, 585 U.S. (slip op. at 5–10) (Thomas, J., dissenting); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 Geo. Mason L. Rev. (issue no. 1, 2019) (forthcoming), at 35–40, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3390064 (*Nationwide Injunctions*); see also Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. Rich. L. Rev. 633 (2018).

The degree to which the approach taken in *Department of Commerce* will produce the adverse consequences identified by *amici* and by Justice Thomas' dissenting opinion depends critically on whether this Court views that decision as setting a pattern for a broad set of cases or as addressing a truly exceptional situation. The opinion in *Department of Commerce* suggests that the decision's acceptance of a judicial inquiry into, and determination based on, official motives is limited to a very small category of disputes. 588 U.S. (slip op. at 24–28). Certainly, the approach taken by the Court in *Trump v. Hawaii*, 585 U. S. (slip op. at 32–37), just a short time prior to *Department of Commerce*, indicates an appreciation of the highly unusual circumstances in which the Court has considered arguments respecting the motives of other federal officers. *Amici* urge the Court to clarify that the decision in *Department of Commerce* responded to an extraordinary set of

circumstances and did not change the long-accepted understanding of the APA.

## ARGUMENT

### I. Judicial Review Should Not Intrude on Discretion Granted to Administrators by Law.

#### A. Courts' Review of Discretionary Agency Action under the APA Is Strictly Limited.

At the outset, it is important to emphasize that the second question presented (the lawfulness of the actions being reviewed) necessarily concerns the scope of review of agency actions that embody "ordinary discretion"—discretionary judgments assigned to administrators but not excepted from judicial review. The first question presented in this case (reviewability) turns on identifying the line between ordinary (reviewable) discretionary judgment and discretionary judgment that lies entirely outside the purview of judicial review. *Amici* do not address the question of reviewability.

##### 1. The APA Provides Limited Review of Discretionary Actions for which Review Is Not Excluded.

However, understanding the proper scope of review does require initial attention to the APA's distinction between asking *whether* a matter is "committed to agency discretion by law" in such a manner as to preclude review, see, e.g., *Chaney*, 470 U.S. at 831–35, and asking *how* courts review matters on which agencies enjoy discretion that remains subject to judicial review, see, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Brand X*, 545 U.S. at 981, 989.

The APA excludes agency actions from judicial review "to the extent that . . . agency action is committed to agency discretion by law," APA, 5 U.S.C. §701(a)(2), and provides for review, among other things, for "an abuse of discretion." APA, 5 U.S.C. §706(2)(A). Obviously, the APA cannot be read to insulate *all* discretionary action from review. That would be wholly at odds with the "abuse of discretion" provision. At the same time, the text of the APA plainly commands respect from courts for the exercise of delegated discretion by agencies. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–47 (1996) (*Smiley*); *Webster v. Doe*, 486 U.S. 592, 600–601 (1988) (*Webster*); *Chaney*, 470 U.S. at 831–35; *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813–14 (1978) (*Citizens Committee*); *American Trucking Associations v. United States*, 344 U.S. 298, 314–15 (1953) (*Trucking Associations*).

The distinction between discretion at odds with review and "ordinary discretion" that remains subject to limited review looks to the particular legal authority for agency action. See, e.g., *Webster v. Doe*, 486 U.S. 592, 599–601 (1988) (*Webster*); *id*., at 605–06 (O'Connor, J., concurring in part and dissenting in part); *id.* at 606–10 (Scalia, J., dissenting). See also Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531, 537–44 (2018) (explaining the relation between ordinary discretion, unreviewable discretion, and judicial review). Review is precluded so far as an action is subject to discretion that is not limited by statutory directives, as, for example, is generally true for the choices prosecutors and similar officials make in deciding which cases to pursue. See *Chaney*, 470 U.S. at 831–35. If this Court determines that the actions at issue here embody judgments that

are framed and limited by statutory directives but are lawfully committed to administrative decision-making, the scope of review is that appropriate to exercises of ordinary discretion. *Amici*'s primary concern is with the terms of review for such decisions.

### 2. Discretionary Actions Based on Policy Considerations Are Subject to Narrow Review for Specific Decision-Making Failures.

When statutes provide limiting directives, exercises of discretion can be reviewed to assure that the administrator has not acted contrary to those directives. See APA, 5 U.S.C. §706(2)(A), §706(2)(C), §706(2)(D); *Chaney*, 470 U.S. at 831–35. Apart from specific constraints on the scope of delegated discretion, courts check the exercise of discretion to assure consistency with basic principles for reasoned decision-making. See, e.g., *Fox Television Stations*, 556 U.S. at 513–14; *Bowman Transp.*, 419 U. S. at 286. The scope of such review is "narrow," and this Court has admonished other courts "not to substitute [their] judgment [on questions of policy] for that of the agency." *State Farm*, 463 U. S. at, 43. Similarly, the Court stated that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Id*., at 42. The narrow review standard reflects understanding that reviewable discretionary action is still *discretionary* action. The law's insulation of other discretionary action from review signals concern over intrusive judicial review of administrative discretion.[2]

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[2] Limited scope of review for discretionary administrative action does not prejudge whether statutorily authorized discretion

The narrow terms chosen to authorize reviewing courts to set aside discretionary agency action emphasize the limited nature of such review. Taking these terms at their common meanings, bases for overturning an action are limited to its being "arbitrary" (not guided by any rational choice principle), "capricious" (following a choice principle that seems chosen by mere whim—such as what color someone wore to a hearing or what letters begin or end a person's last name), or "an abuse of discretion" (such as conferring an advantage on individuals related to the decision-maker or sharing the same political or religious affiliation as the decision-maker). APA, 5 U.S.C. §706(2)(A). That language stands in sharp contrast to the APA's declaration that "the reviewing court shall *decide* all relevant questions of law, *interpret* constitutional and statutory provisions, and *determine* the meaning or applicability of the terms of an agency action." APA, 5 U.S.C. §706 (emphasis added). See also Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron *Step Two*, 2 Admin. L.J. 255, 262–63, 266–67 (1988); Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294, 1311–19 (2015) (*Rethinking*); John F.

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is consistent with constitutional constraints on delegation of legislative power. See, e.g., *Gundy v. United States*, 588 U.S. ____ (2019) (slip op. at 4–6); id., (slip op. at 1, 3, 5–9) (Gorsuch, J., dissenting); *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1042–43 (2007); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 151–61, 177 (2016); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335–53 (2002).

Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 115, 120 (1998); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1087–89 (2008); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 453–56, 472–75 (1989).

Statutory commands such as APA §706 recognize the difference between the scope of judicial review appropriate for *exercises* of administrative discretion for policy matters and the review appropriate for *interpretation* of the *scope* of discretion committed to executive officers. Even though this has been a source of confusion, the *Chevron* decision, interpreting commands congruent with the APA, and other decisions of this Court have appreciated the distinction between those roles. See *Chevron*, 467 U.S. at 843–46, 859, 862–66; see also *Cuozzo*, 136 S. Ct. at 2142–44; *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2600, 2706–97 (2015); *Smiley*, 517 U.S. at 740–47. Scholarly commentary on both the *Chevron* doctrine and related decisions has recognized the importance of this distinction. See, e.g., Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1, 3–5 (2013); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 863–64, 870–72 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989).

This distinction is even more emphatically the basis for calls to make clear that *Chevron* does not require

deference to administrative *interpretations* of *law* as distinct from *policy* judgments made in *implementing* the law. See, e.g., *Cuozzo*, 136 S. Ct. at 2148 (Thomas, J. concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1152–58 (10th Cir. 2016) (Gorsuch, J., concurring); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 781–87 (2010); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* Liberty's Nemesis: The Unchecked Expansion of the State 57, 57–58 (Dean Reuter & John Yoo eds., 2016); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 Admin. L.J. Am. U. 187, 198–200 (1992). The distinction between the scope of review apposite to administrative exercises of policy discretion and to interpretation of legal commands also informed this Court's recently articulated understanding of the *Auer* doctrine's proper scope (or the proper scope of a doctrine that would replace *Auer*). See *Kisor v. Wilkie*, 588 U.S. ___ (2019) (slip op. at 15–18); *id*. (slip op. at 13–18, 20–21) (Gorsuch, J., dissenting); *id*. (slip op. at 1–2) (Kavanaugh, J., dissenting). This Court's rejection of a distinction between judicial deference to administrative determinations respecting an agency's jurisdiction and determinations related to an agency's exercise of authority is not at odds with the recognition that interpretation of law should be distinguished from exercises of policy discretion in its implementation. See *City of Arlington v. Federal Communications Commission,* 133 S. Ct. 1863, 1868–73 (2013).

Many statutes commit some measure of discretion to administrators while setting boundaries around that discretion. The law's directives may tightly constrain the administrative decision or may give

considerable leeway. Indeed, a single statute may do both with respect to different exercises of discretion. See, e.g., *MCI Telecommunications Corp. v. American Tel. & Tel.*, 512 U.S. 218, 220, 234 (1994); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943). The reviewing court's tasks are to interpret the limits set by law—a question on which courts owe agencies no deference—and otherwise to review exercises of discretion *only* for the sorts of unreasonable discretionary action that the APA proscribes: action that is arbitrary, capricious, or an abuse of discretion. See APA, 5 U.S.C. §706(2)(A).

This does not include review to determine if an action is less well-reasoned than a judge would like, or weighs evidence and considerations differently than the judge would have, or is associated with political considerations that the judge would not embrace. See, e.g., *Department of Commerce*, 588 U.S. (slip op. at 16–20); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). Those inquiries would overstep the bounds even of the sort of internal evaluation typically done by executive branch officials reviewing major decisions of other officials—despite recognition that executive branch review, which takes place within the same branch authorized to implement the law, is compatible with a more searching inquiry into the grounds for decision. See, e.g., Christopher DeMuth, *OIRA at Thirty*, 63 Admin. L. Rev. 101, 106 (2011). (One of this brief's *amici* oversaw this process as Administrator of the Office of Information and Regulatory Affairs. See *id*.)

*Amici* urge that, in elaborating the test used to review discretionary agency actions, this Court address the language in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (*Overton Park*),

respecting the need for an inquiry that is "searching and careful." In particular, the Court should make clear that this language does not support review that goes beyond assuring that exercises of discretionary authority are not arbitrary or capricious or an abuse of discretion. Despite its association with the notion of taking a "hard look" at exercises of discretion, *Overton Park* also cautioned that the "standard of review is a narrow one." *Overton Park*, 401 U.S. at 416. Unlike review of discretionary policy decisions, judicial decision respecting the consistency of agency action with legal requirements based on statutory interpretation takes a super-hard look at the issue—courts assess statutory meaning *de novo*, even though their assessment also may read the statute as providing scope for discretionary agency choices, often justified by the agency as resting on a reasonable interpretation of statutory language. See, e.g., Byse, *supra*, at 262–63, 266–67; Cass, *Rethinking*, *supra*, at 1311–19; Herz, *supra*, at 198–200. Non-deferential judicial determinations of statutory meaning coexist with deference on agency choices implementing statutory terms only so far as courts read the law as granting agencies that discretion. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 218–22 (2002); *Smiley*, 517 U.S. at 740–47. *Overton Park* should not be read as changing the standard of review for arbitrariness, capriciousness, or abuse of discretion spelled out in APA §706(2)(A).

### B. The Scope of Review for Discretionary Agency Actions Is Identical for Initial Decisions on an Issue or Changes in Agency Policy Respecting an Issue.

The APA does not support different degrees of scrutiny—specifically, not *increased* scrutiny—for use of discretionary authority to make changes in agency

policies, as compared to using that authority to set policies initially. See, e.g., *State Farm*, 463 U.S. at 41. As this Court has said: "[t]he statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations*, 556 U.S. at 515; see also *State Farm*, 463 U.S. at 41. It would not be reasonable to infer from the APA a general intention to make successive exercises of policy discretion increasingly difficult. Reading such a requirement into the APA would both strain the language of the statute and hinder the responsiveness of the executive branch to the public.

Moreover, heightened scrutiny for actions that change policies would reinforce factors that already restrain policy changes. *Amici*, as former government officials, are well aware that there are many impediments to making policy changes, from the procedural rigors of some policymaking modes to the resistance of individuals and groups advantaged by or invested in the existing policy. See, e.g., Garland, *supra*, at 508; McGarity, *supra*, at 1385–88, 1396–98; Robinson, *supra*, at 189–97, 216–19. Those who wrote and voted for the APA were acutely aware of the nature of administrative decision-making, including the forces that promote—and also those that oppose—changes in policy over time. See, e.g., McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. Econ. & Org. 180, 181, 199–206 (1999); Shepherd, *supra*, at 1560–61, 1583–1623, 1655–68. Recognition that the administrative process is part of a complicated set of processes shaping policy-making and implementation—processes that plainly do not produce a simple transmission belt from presidential election to policy adoption and application—underscores reasons for concern over doctrines that would erect additional barriers to change. That recognition supports the conclusion reached by

this Court in *State Farm* that rescission of a rule is subject to the same review standard as adoption of the rule, not a higher or lower standard, *State Farm*, 463 U.S. at 41.

Agency staff frequently are among those who may resist policy changes. These government officials generally remain at particular agencies longer than politically-appointed officials with policy-making authority. That, along with their frequent association with the adoption of earlier policy initiatives, can reduce enthusiasm about making changes supported by politically-appointed officials who have different views and shorter time horizons on getting policies implemented. See, e.g., Robinson, *supra*, at 185–87, 216–19; Wilson, *supra*, at 48. Staff-level officials' entrenchment in particular agencies, association with existing policies, and ability to impede change strongly counsels against over-weighting disputes between staff resisting change and policy-making officials supporting change. See, e.g., *Department of Commerce*, 588 U. S. (slip op. at 17–20).

In offering that caution, *amici* do not overlook the important insights that long-term official connection with a set of issues or with institutional considerations respecting their resolution may provide.

We do, however, note the potential conflict between *political accountability* provided by election of the Chief Executive—who is charged under Article II of the Constitution with faithfully implementing the law, U.S. Const., Art. II, §3—and legal doctrines that increase opportunities for bureaucratic resistance to initiatives from officers reporting more directly to the President. That concern is reflected in this Court's statement in *Free Enterprise Fund v. Public Company Accountability Oversight Board*, 561 U.S. 477 (2010) (*Free Enterprise Fund*), that "[o]ne can have a

government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Id*., at 499.

This same concern about preserving Presidential authority and public accountability was central to the Court's decision in *Free Enterprise* that limitations on presidential (and presidentially directed) removal of officers unconstitutionally impair the President's obligation to take care that the laws are faithfully executed. *Id*., at 495–98. Whether one applauds or disagrees with the particular application of that concern in *Free Enterprise Fund*, there should be recognition of the importance of concern over excessive interference with control of executive action by the President and "the chain of dependence" between the elected officer and those under him—"the lowest officers, the middle grade, and the highest," *id*., at 498 (quoting James Madison, 1 Annals of Congress 499 (1789).

This Court's reading of the tests set out in APA §706(2)(A) also should be informed by appreciation that the act struck a balance between making administrators accountable for staying within the limits of the law and preventing undue interference with implementation of tasks assigned to administrators. See generally McNollgast, *supra*; Shepherd, *supra*. The modesty of the tests set out in §706(2)(A) is consistent with limiting intrusion into decision-making that is constitutionally and statutorily assigned to the executive branch.

Applying the same modest tests to all reviewable exercises of discretion—whether the agency action consists of adopting a policy respecting matters not previously addressed by the agency, changing a recently adopted policy, or altering a long-standing policy—also is consistent with preserving public accountability.

Simply put, restricting impediments to changing past government decisions facilitates responsiveness to the broad interests expressed in presidential elections.

Justice Rehnquist said this explicitly in his dissent (joined by three other justices) in *State Farm*:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

*State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting) (footnote omitted). While the four justices dissenting agreed with the majority that the same tests govern initial adoptions, revisions, and revocations of rules, they stated that the tests should be applied with greater sensitivity to the policy discretion enjoyed by administrators and to the connection between that discretion and public accountability through elections.

The application of the tests contained in APA §706(2)(A), of course, depends on particular facts respecting the exercise of discretion, and, as stated above, the tests for reviewing *exercises* of discretion are separate from the tests for determining the *extent* to which law confers discretion. Judges should be clear that the burden in challenging exercises of discretion is significant—that is what a narrow standard of review necessarily

means. See, e.g., *Department of Commerce*, 588 U. S. (slip op. at 19–20); *Fox Television Stations*, 556 U.S. at 514–21; *State Farm*, 463 U.S. at 42–43; *Bowman Transp.,* 419 U. S. at 286.

This Court at times has compressed the different standards of §706(2)(A) into a single requirement of reasonableness in the agency's exercise of discretion, including the associated requirement of a reasonable explanation. But that requirement is not altered because an agency changes course:

> [T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. . . . And, of course, the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

*Fox Television Stations*, 556 U.S. at 515. The general application of this same standard of review to both initial and changed policy prescriptions responds to the Court's and the APA's understanding that the exercise of policy discretion is purposely subject to variation over time. See, e.g., *State Farm*, 463 U.S. at 42 ("an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' *Permian Basin Area Rate Cases,* 390 U. S. 747, 390 U. S. 784 (1968)"); *American Trucking Assns., Inc. v. Atchison, T. & S. F. R. Co.,* 387 U. S.

397, 416 (1967) ("[r]egulatory agencies do not establish rules of conduct to last forever").

However, this Court has identified particular settings in which changes in policy require explanation to meet the requirements of APA §706(2)(A). For example, *Fox Television Stations* declared:

> [W]hen, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account[,] . . . [i]t would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

*Id*., 556 U.S. at 514. While this requirement is an important one, it should not be read as a directive to ignore the limitations on judicial review written into law and emphasized repeatedly by this Court. In other words, the explanation required in such circumstances is one that recognizes the issues to be addressed and provides guidance as to the reasons behind the agency's resolution of them. See also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126–27 (2016). The reasons must be sufficient to withstand challenge under the various "arbitrary, capricious" headings in APA §706(2)(A), but the agency's explanation need not satisfy judges of the correctness and cogency of the answers an agency gives. See *Department of Commerce*, 588 U. S. (slip op., at 18–20); *FERC v. Electric Power Supply Assn.*, 577 U. S. ___, ___ (2016) (slip op., at 30); *Fox Television Stations*, 556 U.S. at 515–16. *Amici*

believe it is critical for this Court to clarify the limitations on review in this context.

## II. Courts Should Not Inquire into, or Base Decisions on, Administrators' Motives for Actions Challenged under the APA.

### A. Review of Agency Action under the APA Focuses on Lawfulness Judged by the Reasons Given, Not Motives.

As a rule, for a court reviewing agency action, as this Court has emphatically said, it is "not the function of the court to probe the mental processes" of the administrator. *Morgan II*, 304 U.S. at 18. Justice Frankfurter, writing for the Court in *Morgan IV* explained the reasons to avoid inquiries into the motives and thought processes of a decision-maker in a co-equal branch of government. He compared looking at the motives of an administrator to looking into the motives of a judge rather than what is written in the judge's opinion, concluding that this sort of inquiry would be "destructive" of the responsibility of administrators and would undermine "the integrity of the administrative process." *Morgan IV*, 313 U.S. at 422. Other noted judges have sounded similar warnings, including Judge Learned Hand's thoughtful opinion in *Gregoire*. See 177 F.2d at 580–81.

While repeating these warnings, this Court has stated that inquiries into motive may be permitted in cases in which a challenged policy cannot plausibly rest on any sustainable ground—cases where "it is impossible to 'discern a relationship to legitimate state interests,' or . . . the policy is inexplicable by anything but [legally impermissible] animus.'" *Trump v. Hawaii*, 585 U. S. (slip op. at 33) (quoting *Romer v. Evans*, 517 U.S. at 632, 635). The Court also described the

exceptional cases as involving actions that "lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'" *Trump v. Hawaii*, (slip op. at 33) (quoting *Moreno*, 413 U.S. at 534). In other words, the Court concluded that the rationales advanced in support of the actions being reviewed were insufficient to justify those actions under prevailing constitutional standards of review. See *Romer*, 517 U.S. at 631–33 (challenged actions did not pass rational basis review);[3] *Moreno*, 413 U.S. at 534–38. Finding no rational connection between the stated goals of the challenged actions and the classifications embedded in the actions themselves fit the Court's conclusions that other, unconstitutional, grounds motivated the actions. See *Romer*, 517 U.S. at 634–35; *Moreno*, 413 U.S. at 534–35 (relying also on statements in legislative history).

Last term, in *Department of Commerce*, this Court arguably expanded the set of cases in which inquiries into motive are permitted, finding the argument advanced in support of a discretionary policy decision to have been "pretextual" *even though* the majority found that the stated ground for the decision was reasonable and, taken at face value, was within legal bounds. See *Department of Commerce*, 588 U. S. (slip op., at 19–20). The majority opinion stated:

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[3] While Justice Scalia's dissent denies that the majority engaged in rational basis review, *Romer*, 517 U.S. at 640 (Scalia, J., dissenting), the majority does declare that the Court "will uphold the legislative classification so long as it bears a rational relation to some legitimate end" before stating "Amendment 2 fails . . . even this conventional inquiry." *Id*., at 631–32 (citation omitted). The critique by Justice Scalia concerns more the character of the Court's arguments indicating a lack of rational basis than their absence. See *id*., at 640–53 (Scalia, J., dissenting).

> The Secretary was required to consider the evidence and give reasons for his chosen course of action. He did so. It is not for us to ask whether his decision was "the best one possible" or even whether it was "better than the alternatives."

*Department of Commerce*, 588 U.S. (slip op., at 20) (citation omitted).

Not only did the Court accept the sufficiency of the Secretary's rationale, it instructed that "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id*., (slip op. at 24). The Court also underscored that a policy decision may not be set aside simply "because it might have been influenced by political considerations or prompted by an Administration's priorities." *Id*. The Court further stated that, although "a strong showing of bad faith or improper behavior" could justify an inquiry into "the mental processes of administrative decisionmakers," *id*., the court below had erred in ordering such an inquiry in the case at bar because it entered that order when evidence before the lower court did not satisfy that high standard. See *id*., (slip op. at 24–25).

Nevertheless, the Court found that, as part of the inquiry into the basis for the Secretary of Commerce's decision, evidence was produced demonstrating that the Secretary's proffered explanation was "pretextual," further concluding that this justified and excused the "premature" demand for such evidence. See *id*., (slip op. at 24–28). In contrast to decisions such as *Romer* and *Moreno*, *Department of Commerce* supported setting aside a decision as improperly motivated *after* finding it *justified* on the grounds stated by the administrator, making reference to the administrator's motive a

separate inquiry rather than an extrapolation from the absence of a rational basis for his action.

Because it holds an administrative decision unlawful on grounds of motive after finding it adequately supported in law on the basis of its stated rationale and supporting record, *Department of Commerce* is at odds with the Court's decision in *SEC v. Chenery*, 318 U.S. at 87. *Chenery* stands for the proposition that courts will not look beyond the stated rationale for administrative action. *Chenery* rejected government efforts to shift judicial review from that initial rationale to later explanations that might have proved more in keeping with standards for agency action.

Resistance to considering reasons other than those given initially by the agency equally applies in this setting. Courts should take the agency at its word and test its stated reasons against the APA's standards for review, neither asking what other reasons might have been given nor what hidden motives might be divined. See, e.g., *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973).

### B. Inquiries into Officials' Motives Intrude on Spheres of Action Committed to Co-Equal Branches of Government and Invite Litigation Based on Political or Personal Predilections.

Justice Frankfurter's analogy to probing the actual motivation behind a judicial decision is apt. See *Morgan IV*, 313 U.S. at 422. Disappointed litigants and other critics of judicial decisions may be so certain of the correctness of their position that they greet any contrary decision with suspicion. Every judge is familiar with speculation that something in the judge's background, personal life, religion, or past political associations explains the *real* basis for a decision. Yet

appellate courts routinely review lower court decisions for consistency with the law and do not permit counsel directly to question a judge about his or her thought processes leading to a decision or to subpoena law clerks for similar inquiries.

This Court has stated that the role of a court reviewing administrative actions is comparably circumscribed. Courts properly look at the administrative record and base a judgment on that record; they do not hold hearings on the decision-maker's thinking about the action taken or try to divine that from other extrinsic evidence. See, e.g., *Trump v. Hawaii*, 585 U.S. (slip op. at 32–33); *Camp v. Pitts*, 411 U.S. at 142–43; *Morgan IV*, 313 U.S. at 422; *Morgan II*, 304 U.S. at 18. Nor do courts look at a record—not of lower court proceedings or of administrative proceedings—to divine decision-makers' true motives, as opposed to evaluating whether the decision was legally justified on the grounds asserted. Motives are complex, difficult to ascertain, and seldom matters that courts are well-equipped to assess. That is why rules intended to prevent bias in particular contexts, notably individuated adjudications of rights, address specific types of relationships (principally financial) that can be ascertained from facts, making the objectively established relationship—rather than subjective determinations of motive—decisive. See, e.g., *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). Further, even those rules are not applied to broad policy decisions.[4]

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[4] *Gibson v. Berryhill*, 411 U.S. 564 (1973), concerns a rule-based determination on licensing and turns on the question of the administrators' financial self-interest in adopting the rule. The

Because *Department of Commerce* threatens to greatly expand the occasions for inquiry into the motives of administrators, this Court should clearly specify the limits on such inquiries. While *amici* are skeptical of any such inquiries, permitting inquiries into motive even when administrators have articulated cogent, legally sufficient reasons for their actions invites challenges that almost certainly would enmesh courts in the very sort of difficulties this Court warned against in *Morgan II* and *Morgan IV* and that Judge Hand criticized in *Gregoire*—inquiries that are at odds with the understood division of responsibilities between courts and coordinate branches of government. See, e.g., *Department of Commerce*, 588 U.S. (slip op., at 2, 7–8, 13–15) (Thomas, J., dissenting). In Justice Thomas' words: "[T]he Court's decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction." *Id*., (slip op. at 15) (Thomas, J., dissenting). This "implicate[s] separation-of-powers concerns insofar as it enables judicial interference with the enforcement of the laws." *Id*.

*Amici* strongly endorse the Court's long-standing resistance to examining the motives of administrative decision-makers exercising legally granted authority. *Amici* have been government decision-makers as well as academic critics of government decisions, and have studied taught, and written about government decision-making. Drawing on our experience, *amici* stress the threat to constitutionally separated powers if reviewing

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rule's effect was to make individuals working for one specific firm ineligible to practice optometry. Those specific individuals challenged the rule excluding them from practice. The action at issue in *Gibson*, thus, is tantamount to the sort of individual determination in other cases.

judges seek to plumb the motives of officials in co-equal branches of government. Permitting inquiries into official motives encourages use of judicial review not strictly as a means for keeping official actions within *legal* bounds but as extensions of *political* disputes into the judicial domain. This undermines the perceived legitimacy of the courts and intrudes on decisions committed to other branches. See, e.g., *Trump v. Hawaii*, 585 U.S. (slip op. at 5–10) (Thomas, J., dissenting); Cass, *Nationwide Injunctions*, *supra*, at 35–40; see also Lin, *supra*, at 634–46 (describing coordination among politically-allied state attorneys general and other groups in legal challenges).

Whether and how much the approach taken in *Department of Commerce* produces the harms identified by *amici*, by Justice Thomas' dissenting opinion, and others depends critically on the way this Court views that decision. It can be seen as setting a pattern for a broad set of future cases or as addressing a truly exceptional situation, not likely to be repeated often if at all. Fortunately, the opinion in *Department of Commerce* emphasizes the Court's understanding of the extraordinary circumstances of that case. The decision describes the instances in which inquiry into motive is appropriate as constituting a "narrow exception to the general rule against" such inquiries, 588 U.S. (slip op. at 24); it characterizes the extent of the record available as "rare" for such cases, *id*., (slip op. at 28); and shortly after that, it again states that the case involves "unusual circumstances," *id*. These statements suggest a view of the decision as limited to a very small category of disputes, perhaps even, in the dissenting justices' words, the case may come to be seen as "an aberration—a ticket good for this day and this train only." *Id*., (slip op. at 15) (Thomas, J., dissenting).

Certainly, the approach taken by the Court in *Trump v. Hawaii*, 585 U. S. (slip op. at 32–37), just a short time prior to *Department of Commerce*, indicates an appreciation of the highly unusual circumstances in which the Court has considered arguments respecting the motives of other federal officers. In *Trump v. Hawaii*, the Court rejected entreaties to look into motive, instead reviewing the challenged action to see if it was supported by a merely rational basis, see *id.* (slip op. at 33–37), as has been the rule.

The Court should clarify that the decision in *Department of Commerce* responded to an extraordinary set of circumstances and did not constitute either a change to the accepted understanding of the APA or, worse yet, an open invitation to courts to consider challenges based on the assumption that one political party's or one national administration's motives are at odds with judges' views of shared ideals.

Based on our collective experience in government, studying government, and teaching and writing about government, *amici* firmly believe that permitting judicial inquiries into matters of official motive would be far more likely to damage effective government than to promote it. Such a change would be contrary to the text of the APA, contrary to the weight of precedent, and contrary to underlying governance structures.

## CONCLUSION

The scope of review applied to discretionary actions, when subject to judicial review, should be narrow, should assess specific forms of unlawful decision-making, and should assess the rationale for action, not the motives attributed to those taking the action. The judgment of the court below should be evaluated in accord with these considerations and should be reversed and remanded to the court below if not consistent with these considerations.

Respectfully submitted,

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